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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL JOSUE SALOME,

Defendant and Appellant.

D074447

(Super. Ct. No. INF1600779)

APPEAL from a judgment of the Superior Court of Riverside County, Arjuna T. Saraydarian, Judge. Affirmed as modified.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Cohen Butler and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Abel Josue Salome guilty of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)) committed while a principal was armed with a firearm (§ 12022, subd. (a)(1)). The court sentenced defendant to a determinate term of one year for the firearm enhancement and a consecutive indeterminate term of 25 years to life for the murder.

On appeal, defendant contends the court erred in denying his motion to exclude statements he made during a July 9, 2016 custodial interview, claiming that he did not make a voluntary and knowing waiver of his *Miranda*<sup>2</sup> rights, and that the prolonged interrogation and tone of the questioning in any event rendered any incriminating statements made during the interview coercive and thus, inadmissible. Defendant also contends the jury verdict form is incorrect in that it states in connection with count 1 that the jury found a "principal personally used a firearm," when the section 12022, subdivision (a)(1) enhancement merely required it to find that a principal was "armed with a firearm," during the commission of count 1.

As we explain, we agree the verdict form should be corrected nunc pro tunc to identify section 12022, subdivision (a)(1) as the statutory basis for the jury's true finding on the enhancement, as was reflected in the amended information, the jury instructions, the court's sentence, and the abstract of judgment, all of which correctly provided that a

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<sup>1</sup> All further statutory references are to the Penal Code unless noted otherwise.

<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

principal was "armed with a firearm" during the commission of count 1. In all other respects, the judgment of conviction is affirmed.

## OVERVIEW

Martin Tafoya, who received immunity for his testimony, stated he was living in Coachella with his girlfriend on the night of May 2, and in the early morning hours of May 3, 2016, when the murder of victim Juan "Chapo" Huereca took place. On May 2, Tafoya went to a dollar store to meet an individual to buy methamphetamine. While at the store, Tafoya went to the bathroom. As he was getting ready to leave the store, he saw an office door open. He peeked inside, saw a set of keys in the unoccupied office, and took them. Once outside, Tafoya used the key fob and found the vehicle it started, which turned out to be a Nissan Xterra. He then stole the Xterra with the intention of trading it for drugs, as he had been unable to locate his contact to purchase methamphetamine.

While driving the Xterra, Tafoya went looking for an individual named Manuel, ostensibly his drug dealer. On contact, Manuel instructed Tafoya to take the vehicle to a street in Coachella, and look for a particular individual, whom Tafoya could not locate. Tafoya next drove the Xterra to the street where he lived with his girlfriend. Tafoya, however, parked the stolen vehicle away from their home.

After arguing with his girlfriend, Tafoya left on foot, looking for someone who might help him sell the Xterra. After a few hours, Tafoya encountered defendant, who lived with his grandmother near Tafoya's home. About two weeks earlier, Tafoya had

been introduced to defendant through an acquaintance. After they met, Tafoya and defendant had hung out together a few times, drinking beer and using methamphetamine.

Tafoya told defendant he had stolen a vehicle, and asked defendant to help him sell it or swap it for drugs. Defendant responded he would get back to Tafoya. After going back home and using methamphetamine, Tafoya left and visited his friend "Big Boy," who lived nearby. At some point, defendant also arrived at Big Boy's home. Tafoya also told Big Boy about the stolen Xterra. Per Big Boy's instruction, Tafoya moved the Xterra to a different street, where it would be less likely found by police.

After showing the vehicle to defendant, Tafoya and defendant went back to defendant's home. It was there Tafoya met Angel Delara.<sup>3</sup> Defendant had previously introduced Tafoya to, and together they had gotten "high" with, Delara. While they waited for a telephone call from a potential buyer of the Xterra, they drank alcohol and used methamphetamine. As they waited, Delara suggested the Xterra should again be moved, as it had been parked in the same location for a few hours. After defendant reparked the vehicle, Tafoya stood watch as defendant and Delara removed the car stereo, an amplifier, and other items. With defendant carrying the items in a bag, the three then walked back to defendant's home.

After about an hour, a fourth man later identified as victim Huereca approached defendant's home, asking for defendant. Tafoya noticed Huereca appeared to avoid standing on defendant's property, as Huereca waited in the street to speak with defendant.

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<sup>3</sup> Delara was originally charged along with defendant for Huereca's murder. Before trial, the court granted the People's motion to sever their trials.

Although Tafoya could not hear the entire conversation between defendant and Huereca, he could hear the two discussing the sale of the Xterra in what sounded like a "friendly conversation."

Huereca next approached Tafoya and asked how much he wanted for the Xterra. Tafoya, who then was drunk and high on methamphetamine, sought advice from defendant and Delara. Defendant told Tafoya, "It's up to you . . . [w]hatever you decide," while Delara recommended Tafoya sell the vehicle for \$600 to \$800. As the four men stood outside talking, a white Hyundai Santa Fe came down the street, stopped near the men, then moved a little bit further as defendant alone approached the car and started talking to one of its occupants. A short time later, defendant called Tafoya over and introduced him to a man named "Hector," who Tafoya understood was also interested in purchasing the Xterra.

Hector, who was later identified as Hector Yamanaka, asked Tafoya how much he wanted for the Xterra. Tafoya responded he was leaving the sale of the vehicle to defendant and Delara, as Tafoya "trusted them." Tafoya left and rejoined Huereca and Delara, who were waiting in front of defendant's home. Huereca told Tafoya he had the money, wanted to "do the deal," and asked for the keys. Tafoya responded defendant was handling the sale, but nonetheless handed Huereca the keys to the Xterra. As they talked, Tafoya noticed defendant had left in the Hyundai. As they waited for defendant to return, Huereca suggested he and Tafoya alone drive the Xterra to a certain location, so Huereca could pick up the money to buy the vehicle. Tafoya refused, as Huereca made him nervous.

A short time later, defendant returned in the Hyundai. While still inside the car, at defendant's request Tafoya alone approached the car. Defendant told Tafoya that Huereca in the past had "burn[ed] people" including not paying for things. Yamanaka confirmed defendant's statement, and suggested Tafoya sell the Xterra to him instead. Because defendant appeared "a little bit upset," Tafoya told defendant not to worry, as it was "just a car." Defendant in response stated, "It's not about the car, it's about the principle. I trusted this guy [i.e., Huereca], and he was about to, you know what I mean, make it [*sic*] us look like fools."

Defendant asked Tafoya for the keys. Tafoya informed defendant that he had given them to Huereca. As a result, defendant and Delara went to retrieve the keys from Huereca, who was reluctant to return them, stating he and Tafoya had already made a deal for the vehicle. Tafoya informed Huereca that defendant was handling the deal, which upset Huereca. As things became more heated between Huereca, defendant, and Delara, Tafoya became concerned about the "way things were turning out" over the vehicle.

Tafoya heard Huereca tell defendant he had the money to buy the Xterra, but they needed to drive to another location for Huereca to get it. Tafoya did not want to get into the vehicle with someone he did not know. Defendant believed Huereca's request to drive the Xterra to another location was merely a "setup." Tafoya left the men and began to walk home. As he did so, he saw Huereca, Delara, and defendant walking north. Tafoya heard Delara say, "[G]ive me the keys" and Huereca respond, "Why?"

Once at home, Tafoya smoked more methamphetamine. Shortly thereafter, Tafoya went back outside after his girlfriend had yelled at him for using drugs in their home while her children were present. Once outside, as Tafoya smoked more methamphetamine, he heard what sounded like a gunshot. Tafoya was accustomed to hearing gunshots in the neighborhood. He went back inside, began to argue with his girlfriend, when he heard a knock on the front door. It was Big Boy, who inquired about defendant and Delara. The two men then left and went looking for them.

As they approached defendant's home, Tafoya saw a person wearing all black about 10 yards away, running towards defendant's home. Tafoya saw this individual hide in some bushes next to the home. When Tafoya suggested to Big Boy the individual hiding in the bushes was Delara, Big Boy responded, "I don't see nothing." When Tafoya reiterated there was an individual hiding in the bushes, Big Boy gave the same response.

As the two got even closer to defendant's home, defendant came outside and gave them some sort of hand signal. Big Boy in response told Tafoya, "Let's go back." Tafoya next heard what sounded like someone jumping a fence. As he began walking home, Tafoya saw the white Hyundai drive down the street, make a U-turn and pull up alongside Big Boy. Big Boy got inside the car, which pulled up to Tafoya. Big Boy told Tafoya to get inside. Afraid, Tafoya refused. In addition to Big Boy, Yamanaka and a female were inside the Hyundai.

Yamanaka, who also was given immunity, testified he was in the area on the night of the murder driving his female friend Lydia Ruiz (who also was his roommate) to her

friend Manuel's home, who lived near defendant.<sup>4</sup> As they approached defendant's home, Yamanaka recalled seeing a parked Nissan Xterra, which turned out to be the vehicle stolen by Tafoya. Yamanaka had first met defendant about two days earlier. On that occasion, defendant was outside his home, greeted Ruiz, and she introduced Yamanaka to defendant.

On the night of the murder, as they were driving past defendant's home, defendant was outside and yelled at Ruiz, "I have your speaker here." Ruiz told defendant they would be right back as they continued to Manuel's home. Ruiz went inside, while Yamanaka played darts with Big Boy in Manuel's garage. A little later in the evening, defendant approached Manuel's home, asking for Ruiz. As they were talking, three other men approached Manuel's home on foot, from the same general direction as defendant's home.

Yamanaka recognized Huereca as one of the men in the group because about four years earlier, Huereca had assaulted Yamanaka. On that occasion, Yamanaka, who lived in the same apartment complex as Huereca, put out his hand to greet Huereca, who was with three other men. Huereca in response sucker-punched Yamanaka in the face, and then the four men "jumped" Yamanaka and beat him with a shovel.

Yamanaka did not recognize the other two men with Huereca. However, defendant introduced the three men to Yamanaka, saying "these are my friends" and telling Yamanaka that one was named "Chapo" (i.e., Huereca) and another was named

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<sup>4</sup> Throughout his testimony, Yamanaka referred to defendant as "Bozo."



"Angel" (i.e., Delara). Yamanaka could not recall the name of the third man, who ostensibly was Tafoya.

Because of what Huereca had done to Yamanaka about four years earlier, Yamanaka immediately told defendant to "Get in the [Hyundai]," as Yamanaka wanted to warn defendant about Huereca. As defendant got into the passenger seat, Huereca attempted to get into the backseat. Yamanaka told defendant that Huereca was not welcome. As Yamanaka drove, he asked defendant if the three men were his friends. Defendant responded "no," and stated that this was the first time he had met Huereca, who was an acquaintance of Delara. Yamanaka told defendant about the assault four years earlier and warned defendant that Huereca "always had a gun" and to be careful.

As they spoke, defendant informed Yamanaka that he had been in a fight with a man named "Cyclone" a day or two before; that when Huereca first approached defendant and Delara outside defendant's home, Huereca had said, "What do you say about my buddy Cyclone?"; that when Yamanaka reiterated to defendant that Huereca was "dirty," defendant said, "Yeah, tell me" or words to that effect; and that defendant then expressed to Yamanaka that perhaps Cyclone had sent Huereca to "get [defendant]" or "do something to [him]." Defendant thus agreed with Yamanaka that Huereca could not be trusted and that Huereca likely was there to "set [defendant] up." As they continued to discuss Huereca while driving in the Hyundai, defendant disclosed he was "going to smoke Chapo before Chapo smokes him."

During their conversation, Yamanaka asked defendant what Huereca was doing at defendant's home. It was then defendant disclosed that Huereca was interested in buying

"a car." Defendant then pointed out the stolen Xterra, which was parked nearby, and asked Yamanaka if he wanted to buy the vehicle instead. Yamanaka declined.

As they drove back to Manuel's home, they saw Huereca, Delara, and Tafoya walking on the sidewalk. As instructed by defendant, Yamanaka stopped the car, so that defendant could speak privately to Delara about Huereca. Yamanaka heard defendant tell Delara that Huereca could not be trusted; that he was there to set up defendant; that he was "no good"; and that they should all go back to Manuel's home.

As Yamanaka drove defendant back to Manuel's home, defendant confided that a little earlier in the evening when Huereca had first approached him, Huereca had asked defendant for a ride to the desert to "pick up . . . recycle[d] . . . bottles," which caused defendant to distrust Huereca even more. Yamanaka agreed with defendant's assessment, and suggested Huereca likely did not have money to buy the Xterra if he needed a ride to pick up recycled bottles/materials.

Once parked at Manuel's home, defendant left just as Huereca, Delara, and Tafoya approached on foot. After watching them leave, Yamanaka stayed behind and continued to play darts in Manuel's garage with Big Boy. As they were playing, Yamanaka heard what sounded like an explosion. Yamanaka, Big Boy, Ruiz, Manuel, and Manuel's girlfriend went outside. Concerned because he then was on felony probation for sale and transportation of drugs, Yamanaka told Ruiz they needed to leave the area immediately. As they drove away, Ruiz instructed Yamanaka to make a U-turn and drive towards defendant's home, because she wanted to know what had happened. Although upset by

her request, Yamanaka agreed. As they neared defendant's home, Yamanaka saw defendant and Delara walk from the side of defendant's home holding a speaker box.

Yamanaka stopped the car. Defendant and Delara got inside. Defendant gave Ruiz the speaker and asked if they could have a ride. Ruiz, whose car Yamanaka was driving, agreed. Defendant then said, "Let's go," as he appeared to be in a hurry to leave the area. Ruiz instructed Yamanaka to drive her back to Manuel's home, and then return for her after Yamanaka dropped off defendant and Delara at their desired location.

While alone in the car with defendant and Delara, Yamanaka asked about Huereca. Defendant stated, "He's done." As they drove, defendant told Delara, "Fuck yeah, you got down," while patting Delara on the shoulder. Delara then said to Yamanaka, "Compa [i.e., compadre], you don't say anything to anybody." Afraid, Yamanaka dropped off defendant and Delara near a market in Coachella. Yamanaka then drove the Hyundai to his and Ruiz's home, rather than returning to Manuel's home to pick up Ruiz.

Nelson Gomez, an investigator in the Central Homicide Unit of the Riverside County Sheriff's Department, testified he was the lead investigator in the Huereca murder. As discussed in detail *post*, Investigator Gomez conducted two separate interviews of defendant: one in early May 2016, a few days after the murder; and the other on July 9, 2016, after defendant's arrest, which latter interrogation is the basis of defendant's appeal.

## DISCUSSION

### I

#### Waiver of *Miranda* Rights

##### *A. Additional Background*

The People moved in limine to admit statements made by defendant during the two interviews with Investigator Gomez. The court in response conducted an Evidence Code section 402 hearing.

##### 1. May 2016 Interview

Investigator Gomez testified at the pretrial hearing that about two days after the shooting, defendant called dispatch and agreed to meet with him, as defendant knew law enforcement had wanted to speak with him in connection with the Huereca murder. Investigator Gomez arranged for defendant's transport from Banning to the Thermal sheriff's station, where the interview took place.

Defendant was not handcuffed on the drive to Thermal. Before the interview began, Investigator Gomez told defendant that he was not then under arrest; that he was free to end the interview at any point and leave the station; and that if defendant needed food, water, or to use the restroom during the interview, all he needed to do was ask. At no point during this interview was defendant handcuffed. The interview ostensibly was recorded.<sup>5</sup>

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<sup>5</sup> We write "ostensibly" because it appears neither the recording nor the transcript of the May 2016 interview was included in the appellate record. Certain portions of what defendant said during that interview were admitted at trial, however, as discussed *post*.

After about four hours, defendant stated he wanted to stop the interview and leave the station. Investigator Gomez testified he promptly stopped questioning defendant and arranged a ride to the location of defendant's choice.

## 2. July 9 Interrogation

Included in the record was a recording of the July 9 interrogation and a transcript of that interrogation. In connection with the July 9 station interview, the record shows Investigator Gomez started the interview of defendant as follows, which included reading defendant his *Miranda* rights:

"Gomez: 7/9/2016 at 2053 hours. We are at the . . . Smith Detention Center.  
Investigator Gomez, Sergeant Mendez, Abel Salome. What's up man. Where you been?

"Defendant: Working

"Gomez: Where at?

"Defendant: At Banning.

"Gomez: This catch you by surprise today? Just slide over here. Wherever you want over here man. You don't need to be stuffed in the corner. So obviously you've been arrested on a homicide warrant, right?

"Defendant: Yeah.

"Gomez: Okay. Well, I'm here to talk to you, give you another opportunity. Okay, but before any of that happens, obviously I'm going to read you your rights, but I want you to understand something, okay. Those decisions as to your arrest and all that, like I told you when we first interviewed you — I'm a fact gatherer. I gather the facts, I present it to the DA's office, and I'm going to tell you this, at this point in time, the way

the DA's office is looking at it, it's a he said, he said shit. So again, I didn't need to be here, but I want to give you an opportunity. There's some things I think you need to fix, but that will be up to you. All right. (INCOMPREHENSIBLE.)

"Defendant: Yeah."

The video of the interrogation shows defendant paused and thus appeared to contemplate his response before acknowledging each of his rights under *Miranda*, as they were being read to him as follows by Investigator Gomez:

"Gomez: Okay. We went through this last time, remember?"

"Defendant: Yes, sir."

"Gomez: All right. You have the right to remain silent. You understand that?"

"Defendant: Yes."

"Gomez: Okay. Anything you say can and will be used against you in a court of law. Do you understand that?"

"Defendant: Yeah."

"Gomez: You have a right to talk to a lawyer and have him present while you're being questioned. Do you understand that?"

"Defendant: Yes."

"Gomez: If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Do you understand that?"

"Defendant: Yeah."

"Gomez: All right. Like I said, it's your opportunity to fix your story man, because again, you're not the only one who's wrapped up in this. I can tell you — You

already know who else is wrapped up in it. You already know who's all wrapped up in it. I can tell you, you lied about a bunch of shit.

"Defendant: I —

"Gomez: Well, you need to come clean man, about the car, okay, for one. Everything that was set up with the car, and who set it up. Those are the things you need to fix, because right now yeah, you got a story, okay, but I could put holes all over your story, and he's got a story, and you know who I'm talking about. Look, it's you and Angel [i.e., Delara], okay?

"Defendant: Yeah, I understand. I —

"Gomez: Those are the only two people that were there. Home boy didn't shoot himself, he didn't.

"Defendant: I know that.

"Gomez: And like I told you the last time, you had the most motive to want to whack the dude. The whole thing with the car was your deal. Everyone is saying it's your deal.

"Defendant: Yeah, but they're — Okay. Let — That car wasn't even mine. I — That is like I told you last time. I just called that guy and Hector [i.e., Yamanaka] — because I just fucking met him. I mean just like I told you, everything just came to fucking —

"Gomez: You didn't just meet Hector man. Hector's been around. Hector knows you. Hector knows Angel.

"Defendant: Okay. It was (INCOMPREHENSIBLE) I met Hector the following day before all that bullshit happened, you know. Or maybe two or three days before that. I met him, we exchanged fucking tools, you know what I mean, whatever, drugs, and then fucking he told 'em whenever — You know, I told him I used to steal cars, you know, I was (INCOMPREHENSIBLE) into cars. That's what I told the guy. He told me I can get rid of them for top dollar. That's how I got his number, and that's how that night that car was there. I called Hector. There's no bullshit about that. I barely even knew his first name . . . ."

The record shows during the July 9 interrogation that defendant repeatedly denied killing Huereca; that he told Investigator Gomez he had "nothing to hide"; that, although he took the stereo and an amp, he did not steal the vehicle; that he "probably" had seen the victim once or twice, but did not know him including his name; that when the victim walked up to where he, Delara, and Tafoya were standing, the victim pulled out a knife, displayed it to defendant in a threatening manner, and then asked defendant to go with him into the desert to get money for some "plastic things"; and that defendant therefore believed the victim had "bad" intentions toward him.

Defendant told Investigator Gomez that when Yamanaka and Huereca saw each other shortly before the murder, defendant could "feel the vibe that they had a history and it wasn't good." Yamanaka relayed to defendant how Huereca in the past had beat Yamanaka "with a fucking pole" and had "jacked [Yamanaka]." Yamanaka therefore "wanted to get [Huereca] back." While in the garage at the home of Manuel, Big Boy exclaimed he had a gun. Defendant thus left the garage and approached Huereca, Delara,



and Tafoya. It was then a man defendant called "Chicken" (ostensibly Manuel) came outside also with a "fucking gun" and stated, "you got to get these fucking people out of here." Because Huereca insisted on seeing the Xterra, claiming he wanted to buy it, defendant said he, Huereca, Delara, and Tafoya all started walking in the direction of defendant's home, which also was near where the stolen vehicle was parked.

As they walked, Tafoya took off, leaving only Huereca, Delara, and defendant. Because he was concerned for his own safety, defendant said he made an excuse in an attempt to "get the fuck away from [Huereca]"; and that as they got to the corner of a street, near the location of the stolen Xterra, defendant "took off" and went back toward his home, leaving Delara and Huereca alone.

About mid-way through the July 9 interrogation, defendant stated that Delara had a gun with him and that Delara "was going to go to the next level, it was going to . . . become what it became." Defendant stated Delara was going to use the gun on Huereca, after defendant told Delara that Yamanaka and some other "fools want to fucking kill this fool [i.e., Huereca]." When asked if Delara would have "smoked" Huereca if defendant had not told Delara that others wanted Huereca dead, defendant responded, "Probably not."

During the interrogation, defendant changed his story and stated as they approached the Xterra, Delara suddenly moved closer to Huereca, who was on the sidewalk, while defendant walked in the street, trying to distance himself from the two. Defendant saw Delara reach into his pocket as Delara approached Huereca, and it was

then defendant realized Delara intended to "smoke" Huereca. Defendant told investigators he started running toward his home when he heard a gunshot.

As the interview continued, defendant admitted he told Delara in front of Manuel's home that defendant believed that "this mother fucker" Huereca "came for me [i.e., defendant] (INCOMPREHENSIBLE) came to fucking set me up and take me to the fucking desert, and fucking leave me dead like a fucking dog there, and that's what I wanted to see be done to him. I was angry, I was mad bro, strung out on drugs and shit." Defendant, however, maintained that as he, Delara and Huereca approached the Xterra, defendant told Delara that "they" (i.e., Yamanaka and others) wanted Huereca killed, and not defendant.

As the interrogation continued, defendant again appeared to change his story somewhat, telling officers that Yamanaka was going to shoot Huereca but Yamanaka was "taking too long." After the shooting while in the Hyundai being driven by Yamanaka, defendant told Yamanaka he had "better come through" with his promise of money and drugs in return for Delara's shooting of Huereca. When again asked why Delara killed Huereca, defendant responded, "It's only for money." Later, when again asked why Delara was motivated to shoot Huereca, defendant stated, "[m]oney or dope."

The record also shows that the July 9 interrogation lasted 3 hours 45 minutes; that defendant continued to deny responsibility for the murder of Huereca; that towards the end of the interrogation, Inspector Gomez said, "We done man? You want a break? What do you want to do?" and that defendant in response said, "I want to call my lady and let her know I'm busted," as defendant believed his family would be worried about

him and his whereabouts. When Inspector Gomez asked defendant if there was anything more he wanted to add to his story, defendant responded, "I wish I could go back and do it all over again, and do it different. I wish I could tell you that he didn't die."

When again asked by Inspector Gomez if he was done telling his story, the record shows defendant stated, "You got a few minutes to think?" then, without being prompted, defendant continued to make statements, despite the lengthy interview, including that he had told Delara that "there's going to be some money involved." Defendant also stated that if Yamanaka did not come through with money or drugs, as promised, defendant was going to give Delara his own cars as payment, noting, "I know Angel would have probably came and got me. He fucking knows where my parents live, my kids, staying right down the street from him."

The record shows Inspector Gomez sought to confirm defendant's story as follows: because Yamanaka wanted Huereca killed but then did not show up to do it himself, defendant told Delara that "there was probably some dope and money involved" if Delara killed the victim, "because they wanted him dead." Defendant replied, "Yes." Inspector Gomez added, "And you continued to walk with this guy up to the [Xterra]," to which defendant replied, "Yes."

After some more back and forth, Inspector Gomez again asked defendant, "Is that it man? Anything else? I don't want to pressure you," to which defendant responded, "pressure then." When Inspector Gomez once again asked, "You done Abel," defendant responded, "I'm tired" and then asked whether he was going home. Inspector Gomez responded, "No man. What happens to you from this point on is out of our hands. It's in

the hands of the justice system and the jury." Inspector Gomez then handed defendant his "business card," in case defendant wanted to "reach out," and concluded the interrogation.

### 3. Court's Ruling

At the conclusion of the Evidence Code section 402 hearing, the court ruled the May 2016 interview was admissible because defendant initiated that interview when he called dispatch and voluntarily went to the sheriff's station; that defendant then was not under arrest or subject to a custodial interrogation; and that law enforcement ended the interview and provided defendant a ride, after defendant said he wanted to leave the station. The court also found there was no evidence defendant was "coerced or under any compulsion to converse with" law enforcement during this initial interview.

Regarding the July 9 interrogation, the court found the evidence showed defendant "was advised of all his *Miranda* rights and he did voluntarily waive those rights." Although defendant had a recording and transcript of the July 9 interrogation, he then did not allege that his statements were coerced and thus involuntary as a result of the length of the interrogation or the manner in which it was conducted.

### B. *Guiding Principles*

Denial of a suppression motion on *Miranda* or coercion grounds requires a reviewing court to defer to the trial court's resolution of disputed facts, if the resolution is supported by substantial evidence. (*People v. Jackson* (2016) 1 Cal.5th 269, 339.)

" ' ' ' "We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." ' ' ' "

(*Ibid.*) " 'When, as here, the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.' " (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

Persons in custody or otherwise deprived by law enforcement of their freedom of movement must be fully informed by law enforcement of their right to remain silent, that any statement made may be used as evidence against them, the right to an attorney, and that an attorney may either be retained or appointed. (*Miranda, supra*, 384 U.S. at p. 444; see *People v. Wash* (1993) 6 Cal.4th 215, 237 (*Wash*) [noting law enforcement must reasonably convey to suspects each of their rights as established by *Miranda*].)

Defendant contends on appeal that he did not properly waive his *Miranda* rights. A "waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.' " (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384.) "It is well settled that law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview and that a valid waiver of such rights may be implied from the defendant's words and actions." (*People v. Parker* (2017) 2 Cal.5th 1184, 1216 (*Parker*); *People v. Gonzales* (2012) 54 Cal.4th 1234, 1269 [noting a "defendant's decision to answer questions after indicating that he or she understands the *Miranda* rights may support a finding of implied waiver, under the totality of the circumstances"]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169.)

" 'In general, if a custodial suspect, having heard and understood a full explanation of his or her *Miranda* rights, then makes an uncompelled and uncoerced decision to talk, he or she has thereby knowingly, voluntarily, and intelligently waived them.' [Citations.]" (*Parker, supra*, 2 Cal.5th at p. 1216.) " 'A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. (*People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.) In contrast, an unambiguous request for counsel or refusal to talk bars further questioning. (*Davis v. United States* (1994) 512 U.S. 452, 458–460.)' ([*People v.*] *Cruz* [(2008)] 44 Cal.4th [636,] 667–668 [(*Cruz*)].)" (*People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 218-219 (*Saucedo-Contreras*).)

"Ultimately, the question becomes whether the *Miranda* waiver is shown by a preponderance of the evidence to be voluntary, knowing and intelligent under the totality of the circumstances surrounding the interrogation. ([*People v.*] *Williams* [(2010)] 49 Cal.4th [405,] 425 [(*Williams*)]; *People v. Dykes* (2009) 46 Cal.4th 731, 751; *Cruz, supra*, 44 Cal.4th at p. 668.) The waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception' (*Moran v. Burbine* (1986) 475 U.S. 412, 421), and knowing in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' (*Ibid.*)" (*Saucedo-Contreras, supra*, 55 Cal.4th at p. 219.)

### C. Analysis

Here, defendant's waiver was implied. After defendant was properly admonished of his *Miranda* rights by Inspector Gomez during the July 9 interrogation, the record shows that defendant without hesitation began answering questions posed by the officers. The questioning began about the stolen Xterra, including how defendant had become involved in helping Tafoya sell the vehicle or swap it for drugs, and then later moved to the killing of Huereca, including the reason for it and who was the shooter.

Moreover, toward the end of the interrogation, even when Inspector Gomez repeatedly asked defendant if they were "done" or whether defendant had anything to add, defendant continued to answer questions and make statements, at one point even asking the officers to give *him* more time to "think," then went on to volunteer additional information regarding the murder of Huereca. Based on our independent review of the record of the July 9 interrogation, we conclude a preponderance of the evidence shows that defendant freely, knowingly, and voluntarily waived his *Miranda* rights when he agreed to speak with the officers. (See *Sauceda-Contreras*, *supra*, 55 Cal.4th at pp. 218–219; *Cruz*, *supra*, 44 Cal.4th at pp. 667–668.)

Although he did not specifically raise the issue at the Evidence Code section 402 hearing,<sup>6</sup> defendant on appeal contends the waiver of his *Miranda* rights was coerced

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<sup>6</sup> Because we reach the merits of this issue, we decline to address the People's alternate contention that defendant, by failing to raise during the Evidence Code section 402 hearing that Investigator Gomez's remarks both pre- and post-*Miranda* rendered defendant's implied waiver involuntary, forfeited this claim on appeal.

because of statements made by Inspector Gomez immediately before and after such rights were administered.

Pre-*Miranda* statements by police that are " ' "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his [or her] free will" ' " do not make a subsequent waiver involuntary. (*Wash, supra*, 6 Cal.4th at pp. 240–241.) Thus, advising a suspect that it would be better if he or she told the truth, when unaccompanied by either a threat or a promise to do so, does not render a subsequent confession or incriminating statements involuntary. (*People v. Davis* (2009) 46 Cal.4th 539, 600 (*Davis*).) Nor does informing a suspect that his or her cooperation would be communicated to the district attorney constitute a promise of leniency. (*People v. Boyde* (1988) 46 Cal.3d 212, 239; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203–1204.)

As summarized *ante*, prior to reading defendant his *Miranda* rights, Inspector Gomez made a few statements. Specifically, Inspector Gomez confirmed defendant understood he was arrested on a homicide warrant. Inspector Gomez also stated that he was a fact-gatherer; that the district attorney was looking at the case as a "he said, he said" matter; and that he was there to give defendant a chance to "fix" things, but that it was "up to [defendant]."

Here, we conclude the substance of Inspector Gomez's pre-*Miranda* remarks that it was a "he said, he said" matter — obviously referring to Delara and defendant — and that defendant had a chance to "fix" things, were simply statements designed to encourage defendant to tell the truth and cooperate with law enforcement. (See *Davis, supra*, 46



Cal.4th at p. 600.) There was no promise of leniency made by Inspector Gomez when he made such remarks, which in any event were fleeting; nor were such remarks inherently threatening or intimidating. The record also shows defendant did not make any incriminating statements prior to receiving the *Miranda* warning in response to such remarks. Instead, defendant merely responded, "Yeah" when told it was up to him to "fix" things. Thus, based on the totality of the circumstances, we conclude the record does not support defendant's contention that Inspector Gomez's pre-*Miranda* remarks rendered defendant's *Miranda* waiver involuntarily.

We reach the same conclusion with respect to Inspector Gomez's post-*Miranda* statements, also summarized *ante*, in which he reiterated to defendant this was his opportunity "to fix [his] story"; that they already knew defendant had "lied about a bunch of shit" during his May 2016 interview; and that defendant "need[ed] to come clean" because there were many "holes" in defendant's story. Again, we conclude such statements merely encouraged defendant to tell the truth. (See *People v. Spears* (1991) 228 Cal.App.3d 1, 27 (*Spears*) [finding a detective's post-*Miranda* comments to a defendant that it was "time [he] got this off [his] chest" and that defendant "would be better off once he gave them 'the scoop' " as nothing more than the benefit which would naturally flow from pursuing a truthful and honest course of conduct]; see also *People v. Jackson* (1980) 28 Cal.3d 264, 299 [finding officer's statement that defendant would " 'feel better' " if he confessed did not constitute improper inducement], overruled on another ground as stated in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.; *People v. Hill* (1967) 66 Cal.2d 536, 548–549 [finding no improper police inducement where

officer urged the defendant to " 'help himself' "].) Accordingly, we independently conclude that Inspector Gomez's post-*Miranda* statements conveyed no improper inducements, express or implied, which would render defendant's waiver of his *Miranda* rights involuntary.

## II

### Defendant's Statements were Voluntary and Uncoerced

Defendant next contends that, regardless of *Miranda*, his statements to police during the July 9 interrogation should have been excluded as involuntary due to coercion by police. Specifically, he contends the length of the July 9 interrogation, the lack of breaks, food, and water, and the tone and repetitive nature of the officers' questioning during that interrogation, overcame his free will and rendered his statements involuntary.

#### *A. Brief Additional Background*

The record shows before Inspector Gomez took the witness stand, the defense moved to exclude the video — but not the audio — portion of the July 9 interrogation. The defense argued the video of the interrogation might portray defendant in a "negative way," as the interrogation was done soon after his arrest and defendant "may [have] be[en] tired." The court denied the defense's request, noting the video and audio were the best evidence for the jury to judge credibility and demeanor.

Inspector Gomez testified before the jury regarding the May 2016 interview of defendant. During that interview, defendant, after being properly admonished, identified Delara through a six-pack photographic lineup. Defendant also identified the stolen Xterra in a photograph and admitted stealing the radio, amplifier, and a speaker box from

the vehicle. Also during the May interview, defendant identified Huereca from a photograph and wrote the words "scary guy" on it. Defendant told Inspector Gomez during this interview that, on the night of the murder, he was "paranoi[d]" of Huereca, and believed Huereca was there to "set him up" and kill him.

Inspector Gomez testified the July 9 postarrest interrogation of defendant took place in an interview room at the Larry Smith Correctional Facility in Cabazon. Portions of the video of the interrogation were played for the jury, while Inspector Gomez was on the stand. The video shows that defendant was not shackled during the interview; that the officers were dressed in plain clothes and appeared unarmed; and that initially defendant was seated in the corner of the room but moved to the middle of the room at Investigator Gomez's suggestion, as noted *ante*. The record shows the interrogation of defendant lasted 3 hours 45 minutes, as also noted, and started around 9:00 p.m.

Inspector Gomez testified that in his experience working nine years in homicide, a typical suspect interview lasted about three hours, although some went longer; that during the July 9 interrogation, they repeatedly asked defendant why Delara would murder Huereca, as Delara did not appear to have any motive for the killing; and that defendant's responses to that question did not add up, in light of their police investigation, which had included interviewing multiple witnesses involved in the incident.

At the conclusion of the direct examination of Inspector Gomez and outside the presence of the jury, the defense moved to exclude the "entire video audio evidence" that the jury had already been shown. The defense argued the video showed the two officers

"were abusive, excessive" and used an "inquisition style" and "technique[] . . . beyond what is ordinarily allowed."

The prosecutor argued that the request of the defense to exclude the video and audio recording was untimely and that, in any event, the officers' interrogation of defendant was proper and did not amount to coercion, as the officers were merely putting "pressure" on defendant to get to the truth.

The court agreed the defense's request was a "little untimely." The court noted the defense was in possession of the recording and a transcript of the recording at the Evidence Code section 402 hearing, but never raised the coercion issue. The court nonetheless ruled on the merits of the defense's request, stating it "did not see anything in there [i.e., the recording] that being close to really coercive," and thus denied the request.<sup>7</sup>

### B. *Guiding Principles*

" 'Both the state and federal Constitutions bar the prosecution from introducing a defendant's involuntary confession into evidence at trial.' " (*People v. Wall* (2017) 3 Cal.5th 1048, 1065 (*Wall*); see *People v. McCurdy* (2014) 59 Cal.4th 1063, 1086 [noting the " 'due process clause of the Fourteenth Amendment precludes the admission of any involuntary statement obtained from a criminal suspect through state compulsion' "].) "A confession is involuntary if the ' " 'influences brought to bear upon the accused were

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<sup>7</sup> Because we reach the merits of the coercion issue, we need not address whether defendant forfeited this claim of error on appeal by failing to raise it during the Evidence Code section 402 hearing or before substantial portions of the video were played to the jury during Inspector Gomez's direct examination.

"such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." ' ' ' ' (Wall, at pp. 1065–1066.) "However, 'no single factor is dispositive in determining voluntariness . . . rather[,] courts consider the totality of the circumstances.' " (Id. at p. 1066; see *People v. Linton* (2013) 56 Cal.4th 1146, 1176 [same].)

" 'A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises or secured by the exertion of improper influence.' " (Wall, *supra*, 3 Cal.5th at p. 1066.) However, " ' there is nothing improper in pointing out that a jury probably will be more favorably impressed by a confession and a show of remorse than by demonstrably false denials. . . . Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth.' " (*People v. Case* (2018) 5 Cal.5th 1, 26; see *Williams, supra*, 49 Cal.4th at p. 444 [noting " '[n]o constitutional principle forbids the suggestion by authorities that it is worse for a defendant to lie in light of overwhelming incriminating evidence' "]; *People v. Holloway* (2004) 33 Cal.4th 96, 115 (*Holloway*) [noting the " 'mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary' "].)

" 'Once a suspect has been properly advised of his [or her] rights, he [or she] may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between

police and suspect. . . . Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession. . . . [The police] are authorized to interview suspects who have been advised of their rights, but they must conduct the interview without the undue pressure that amounts to coercion and without the dishonesty and trickery that amounts to false promise. [Citation.]' "

(*Holloway, supra*, 33 Cal.4th at p. 115.)

" 'On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, "[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne." ' ( *People v. Massie* (1998) 19 Cal.4th 550, 576.)" (*Holloway, supra*, 33 Cal.4th at p. 114.)

### C. Analysis

The record — including the video recording — shows that throughout the interrogation, defendant maintained it was Delara and not him that shot and killed Huereca; that, although defendant was afraid of Huereca and believed he might have wanted to "set up" defendant, it was Delara who killed Huereca because Yamanaka wanted revenge for a beating he suffered years earlier by Huereca and others; and that Delara killed Huereca for money or drugs or both.

The record shows the officers pressed defendant during their questioning and noted on many occasions that defendant's story did not add up and that he appeared to be

lying. However, in pressing defendant, at no time did the officers make any threats of punishment for his failure to admit or confess particular facts, nor did they make any false promises of leniency as a reward for any such admission or statement. Rather, the record shows the officers pressed defendant to tell the truth, to get this "off his chest." (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 61 (*Coffman and Marlow*) [noting that confronting a suspect with the evidence is not deceptive and does not amount to coercion]; see also *Williams, supra*, 49 Cal.4th at p. 444; *Holloway, supra*, 33 Cal.4th at p. 115; *Spears, supra*, 228 Cal.App.3d at p. 27 [finding nothing improper in a detective's post-*Miranda* comments to a defendant that it was " 'time [he] got this off [his] chest' "].)

The record also belies defendant's contention he became worn down by the length of the interrogation. While it is true the July 9 interrogation lasted 3 hours 45 minutes, we note the interrogation of defendant in early May — which defendant has not challenged on appeal — lasted about the same amount of time. In addition, at the end of the July 9 interrogation, even after the officers asked, "are we done?" and "do you have anything to add?" and made similar such phrases suggesting the interrogation was over or defendant himself could end it, the record shows defendant *continued* to speak with, and engage, the officers, at one point even asking if he could have a few minutes to think before spontaneously stating that Delara had killed Huereca because Yamanaka had agreed to pay money and/or provide drugs for the killing. Thus, even towards the end of the interrogation, the record shows defendant maintained his innocence.

In addition, the record does not show during the July 9 interrogation that defendant *at any time* asked to take a break, or requested water or food, or otherwise sought to invoke his right to remain silent or his right to terminate the interview. After defendant offered that Delara murdered Huereca in return for the payment of money and/or for drugs, Inspector Gomez again asked defendant if he was done, or needed a break. It was then, for the first time, that defendant said he was "tired." When Inspector Gomez told defendant to get "it off [his] chest," defendant responded, "It's already off," and then asked if he could go home. At that point, Inspector Gomez handed defendant his business card, said he would return if defendant wanted to talk further, and ended the interrogation by telling defendant he could make a phone call to his family.

Finally, we note at the time of the interrogation defendant was about 32-years old, had earned a high school diploma, was in good physical health, and was no stranger to the criminal justice system, as he had a lengthy criminal record with multiple felony convictions dating back to 2000, when he was juvenile, where he was charged with assault with a deadly weapon other than a firearm (former § 245, subd. (a)(1)); and was on probation at the time of the instant offense. (See *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1404 [noting factors to consider in whether a suspect's confession was coerced include the sophistication of the suspect, his or her prior experience with the criminal justice system, and his or her emotional state].)

Focusing on the totality of the circumstances surrounding the July 9 interrogation, we independently conclude defendant's statements to police were not the product of his



will being overborne, but instead were voluntary and made of his own free will. (See *Wall, supra*, 3 Cal.5th at p. 1066; *Holloway, supra*, 33 Cal.4th at p. 114.)

### III

#### Correction of Verdict Form

Finally, defendant contends the jury verdict form should be corrected nunc pro tunc to show the jury found a "principal was armed with a firearm" as set forth in section 12022, subdivision (a)(1), as opposed to the finding it made which was "a principal personally used a firearm" without reference to any section of the Penal Code. We agree.

The amended information alleged as follows with respect to this enhancement to count 1: "It is further alleged that in the commission and attempted commission of the above offense the said defendant, ABEL JOSUE SALOME, was armed with a firearm, and was principal, where another principal in said offense was armed with a firearm, to wit: revolver, said arming not being an element of the above offense, within the meaning of Penal Code section 12022, subdivision (a), subsection (1)."

The record shows the jury was properly instructed that to find the enhancement true, it had to find "one of the principals was armed with a firearm in the commission of that crime." The record also shows the court properly sentenced defendant to a one-year determinate term for the violation of this enhancement, as set forth in subdivision (a)(1) of section 12022, which statute was also referenced in the sentencing minute order. Likewise, the abstract of judgment shows defendant was sentenced to a one-year determinate sentence under section 12022, subdivision (a)(1), which statute was also referenced by the probation report.

Thus, the record shows that defendant was properly sentenced to a one-year determinate term pursuant to the section 12022, subdivision (a)(1) enhancement for a principal armed with a firearm. Nonetheless, out an abundance of caution, we agree the verdict form should be corrected to identify the statute pertaining to this enhancement, section 12022, subdivision (a)(1), and to state the correct basis of the jury's finding, that a principal was "armed with a firearm" during the commission of count 1.

#### DISPOSITION

The jury verdict form should be correct nunc pro tunc to identify Penal Code section 12022, subdivision (a)(1) as the statutory basis for the jury's true finding in connection with the enhancement that a principal was "armed with a firearm" during the commission of count 1. In all other respects, the judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

GUERRERO, J.